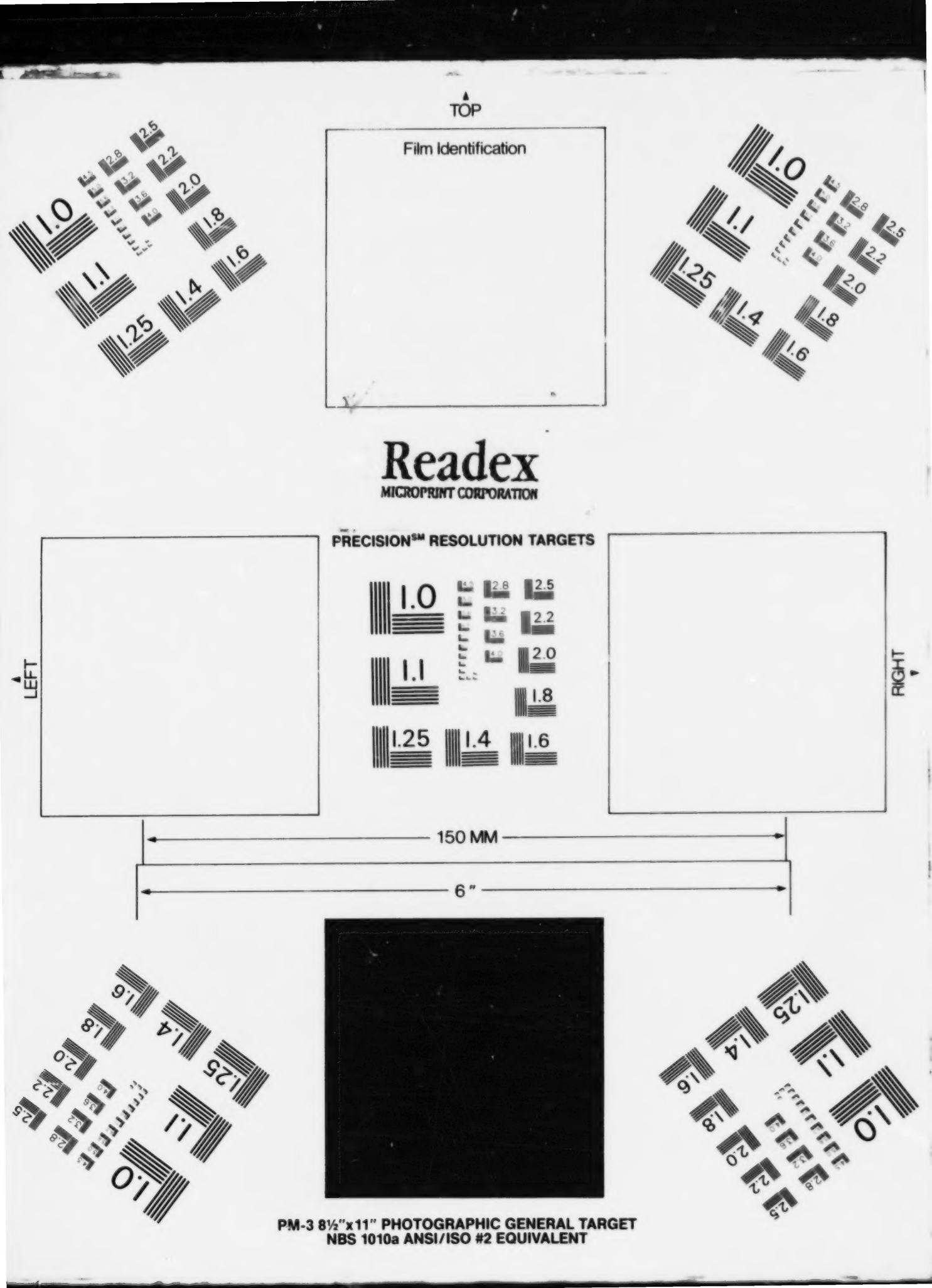

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Intergovernmental Group of Experts on
Restrictive Business Practices
Eleventh session
Geneva, 23 November 1992
Item 4 (c) of the provisional agenda

CONTINUED WORK ON THE ELABORATION OF A MODEL LAW OR LAWS ON RESTRICTIVE BUSINESS PRACTICES

Proposed amendments to the

revised draft of possible elements for articles of

a model law or laws, and commentaries on the elements

Prepared by the UNCTAD secretariat

GE.92 - 52090

CONTENTS

Part			Paragraphs	Page
	INTRODUCTION		1 - 5	1
I.	A.	DRAFT POSSIBLE ELEMENTS FOR ARTICLES:	6	2
		TITLE OF LAW: Elimination or control of restrictive business practices; Antimonopoly law; Competition Act		2
		POSSIBLE ELEMENTS FOR ARTICLE 1 Objectives or purpose of the law		2
		POSSIBLE ELEMENTS FOR ARTICLE 2 Definitions and scope of application		2
		POSSIBLE ELEMENTS FOR ARTICLE 3 Restrictive agreements or arrangements		3
		POSSIBLE ELEMENTS FOR ARTICLE 4 Acts or behaviour constituting an abuse, or acquisition and abuse, of a dominant position of market power		3
		POSSIBLE ELEMENTS FOR ARTICLE 5 Some possible aspects of consumer protection		5
		POSSIBLE ELEMENTS FOR ARTICLE 6 Notification		5
		POSSIBLE ELEMENTS FOR ARTICLE 7 The Administering Authority and its organization		6
		POSSIBLE ELEMENTS FOR ARTICLE 8 Functions and powers of the Administering Authority		6
		POSSIBLE ELEMENTS FOR ARTICLE 9 Sanctions and relief		7
		POSSIBLE ELEMENTS FOR ARTICLE 10 Appeals		7
		POSSIBLE ELEMENTS FOR ARTICLE 11 Action for damages		7
	B.	PROPOSED AMENDMENTS	7 - 45	8
		Article 1	9 - 14	8
		Article 2	15 - 23	9
		Articles 3 and 4	24 - 37	10
		Article 5	38	13
		Article 6	39 - 41	14
		Articles 7 and 8	42 - 44	16
		Article 11	45	17

CONTENTS (continued)

Part		Paragraphs	Page
II.	COMMENTARY TO ARTICLES	46 - 108	18
	COMMENTARY TO ARTICLE 1	47 - 48	18
	Objectives or purposes of the law		
	COMMENTARY TO ARTICLE 2	49 - 54	18
	Definitions and scope of application		
	COMMENTARY TO ARTICLE 3	55 - 70	19
	Restrictive agreements or arrangements		
	- Prohibition of restrictive agreements or arrangements		
	- Illustrative list of practices 11		
	- Authorization of practices not prohibited outright		
	COMMENTARY TO ARTICLE 4	71 - 91	21
	Acts or behaviour in an abuse, or acquisition and abuse, of a dominant position of market power		
	- Prohibition on acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power		
	- Abusive acts or behaviour		
	- Other restrictions on the purchase, manufacture and sale of goods		
	- Mergers, takeovers, joint ventures, or other acquisitions of control, including interlocking directorates, whether of a horizontal, vertical or conglomerate nature		
	COMMENTARY TO ARTICLE 5	92 - 95	26
	Some possible aspects of consumer protection		
	COMMENTARY TO ARTICLE 6	-	26
	Notification		
	COMMENTARY TO ARTICLE 7	96 - 98	26
	The Administering Authority and its organization		
	COMMENTARY TO ARTICLE 8	99 - 102	27
	Functions and powers of the Administering Authority		
	COMMENTARY TO ARTICLE 9	103 - 104	27
	Sanctions and relief		
	COMMENTARY TO ARTICLE 10	105 - 106	28
	Appeals		
	COMMENTARY TO ARTICLE 11	107 - 108	28
	Private actions for relief or damages		

INTRODUCTION

1. At its tenth session, the Intergovernmental Group of Experts on Restrictive Business Practices considered a preliminary report by the UNCTAD secretariat on its continuing work on the elaboration of a model law or laws on restrictive business practices (RBPs) (TD/B/RBP/81).

2. In order to assist and guide the secretariat in completing its task, Governments and regional groupings were invited to make comments on this report and to supply the necessary information on recent and continuing developments in the control or elimination of restrictive business practices.

3. The Intergovernmental Group of Experts, at its tenth session, welcomed "the useful work done by the UNCTAD secretariat on a revised draft of possible elements for articles of a model law or laws" (TD/B/RBP/81), and requested "the secretariat to prepare a further draft of the paper, taking into account the comments made at the tenth session of the Intergovernmental Group of Experts, and written comments to be submitted by the end of January 1992".[1] Apart from the general comments of Group B, which are found in paragraph 53 of the report of the Intergovernmental Group of Experts on Restrictive Business Practices, on its tenth session (TD/B/1310-TD/B/RBP/85), detailed comments were received from the United Kingdom and the United States of America.

4. The present document reproduces basically the text of the proposals contained in TD/B/RBP/81, to which a new section B, under Part I, entitled "Proposed amendments", has been added on the basis of the detailed comments received.

5. On the basis of these proposals, the Intergovernmental Group of Experts is invited to decide, at its eleventh session, on the final text of a model law or laws on restrictive business practices.

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[1] Cf. Report of the Intergovernmental Group of Experts on its tenth session (TD/B/1310-TD/B/RBP/85), annex I, para.4.

PART I

A. DRAFT POSSIBLE ELEMENTS FOR ARTICLES

6. With a view to facilitating the work of the Intergovernmental Group of Experts on Restrictive Business Practices, at its eleventh session, the original text of the draft possible elements, as contained in TD/B/RBP/81, is reproduced below, unchanged. It has to be viewed in conjunction with the proposed amendments contained in Part I, B. on page 8 of this report.

TITLE OF THE LAW :

Elimination or control of restrictive business practices

Antimonopoly Law

Competition Act

POSSIBLE ELEMENTS FOR ARTICLE 1

OBJECTIVES OR PURPOSE OF THE LAW

To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

POSSIBLE ELEMENTS FOR ARTICLE 2

DEFINITIONS AND SCOPE OF APPLICATION

1. Definitions

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the state, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

(b) "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

(c) "Relevant market" refers to the line of commerce in which competition has been restrained and to the geographic area involved, defined to include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the state itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

POSSIBLE ELEMENTS FOR ARTICLE 3

RESTRICTIVE AGREEMENTS OR ARRANGEMENTS

I. Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal:

(a) Agreements fixing prices or other terms of sale, including in international trade;

(b) Collusive tendering;

(c) Market or customer allocation;

(d) Restraints on production or sales, including by quota;

(e) Concerted refusals to purchase;

(f) Concerted refusal to supply;

(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

II. Authorization

Practices falling within paragraph I, when properly notified in advance, and when made by firms subject to effective competition, may be authorized when competition officials conclude that the agreement as a whole will produce net public benefit.

POSSIBLE ELEMENTS FOR ARTICLE 4

ACTS OR BEHAVIOUR CONSTITUTING AN ABUSE OR ACQUISITION AND ABUSE OF A DOMINANT POSITION OF MARKET POWER

I. Prohibition of acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:

(i) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;

(ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

II. Acts or behaviour considered as abusive:

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

(d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

(f) Mergers, takeovers, joint ventures, or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or a conglomerate nature, when:

(i) At least one of the enterprises is established within the country; and

(ii) The resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

III. Authorization

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are notified, as described in Article 6, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

POSSIBLE ELEMENTS FOR ARTICLE 5

SOME POSSIBLE ASPECTS OF CONSUMER PROTECTION

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

POSSIBLE ELEMENTS FOR ARTICLE 6

NOTIFICATION

I. Notification by enterprises

1. When practices fall within the scope of Articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the Administering Authority, providing full details as requested.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.;

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by effluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within ( ) days months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of Articles 3 and 4, and existing on the date of the coming into force of the law, with the proviso that they be notified within (days months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within ( ) days months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfillment of conditions and obligations.

2. Periodical review procedure for authorizations granted every ( ) months years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfillment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:

(a) The circumstances justifying the granting of the authorization have ceased to exist.

(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;

(c) Information provided in seeking the authorization was false or misleading.

POSSIBLE ELEMENTS FOR ARTICLE 7

THE ADMINISTERING AUTHORITY AND ITS ORGANIZATION

1. The establishment of the Administering Authority and its title.

2. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the authority responsible for their appointment.

3. Qualifications of persons appointed.

4. The tenure of office of the chairman and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.

5 Removal of members of the Authority.

6. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

7. The appointment of necessary staff.

POSSIBLE ELEMENTS FOR ARTICLE 8

FUNCTIONS AND POWERS OF THE ADMINISTERING AUTHORITY

I. The functions and powers of the Administering Authority could include (illustrative):

(a) Making inquiries and investigations, including as a result of receipt of complaints;

(b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;

(c) Undertaking studies, publishing reports and providing information to the public;

(d) Issuing forms and maintaining a register, or registers, for notifications;

(e) Making and issuing regulations;

(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;

(g) Promoting exchange of information with other States.

II Confidentiality:

1. According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.

3. Protecting the deliberations of government in regard to current or still uncompleted matters.

POSSIBLE ELEMENTS FOR ARTICLE 9

SANCTIONS AND RELIEF

I. The imposition of sanctions, as appropriate, for:

(i) Violations of the law;

(ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;

(iii) Failure to supply information or documents required within the time limits specified;

(iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense;

II. Sanctions could include:

(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);

(iii) Interim orders or injunctions;

(iv) Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

(vi) Restitution to injured consumers;

(vii) Treatment of the administrative or judicial finding of illegality as *prima facie* evidence of liability in all damage actions by injured persons.

POSSIBLE ELEMENTS FOR ARTICLE 10

APPEALS

1. Request for review by the Administering Authority of its decisions in light of changed circumstances.

2. Affording the possibility for any enterprise or individual to appeal within ( ) days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.

POSSIBLE ELEMENTS FOR ARTICLE 11

ACTIONS FOR DAMAGES

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

B. PROPOSED AMENDMENTS

7. The text proposed below takes into account the general comments made by the spokesman for Group B at the tenth session of the IGE on RBPs, which are that:

(i) the elements in the current version include an economic development test for the assessment of RBPs and do not rely on a competition test. This applied essentially to the end of Article 1 and Article 4 1 (ii). Group B considered that a competition test should be the main focus of a competition law.

(ii) several features of the model law appear to impose considerable regulatory burdens on enterprises in terms of making notifications and seeking approvals or exemptions. This applied particularly to Article 6.

8. In addition, detailed comments received from the United Kingdom and the United States are also taken into account in the text proposed below.

ARTICLE 1: "Objectives or purpose of the law"

9. The comments received from the United Kingdom state that the model law as provided in TD B RBP 81 is concerned with abuse of dominance, rather than abuse of market power. Depending on how dominance is defined, the concept of dominance may be narrower than market power and thus not catch certain unilateral acts. The objectives in Article 1 are also limited to abuses which restrain competition. This does not cover abuses such as monopoly pricing, which is not generally considered to be "anti-competitive" since it does not prejudice competition or potential competitors. The reference to economic development in Article 1 obviously allows room for a wide interpretation, but perhaps such a phrase is unavoidable in this context."

10. The United States, for its part, strongly object to the inclusion of economic development in Article 1 as an appropriate objective or purpose of the law. In their view, competition laws work best when they have a clear focus on protecting competition and consumer welfare, and may be subject to abuse when other goals are added or substituted. A State may, of course, have a strong and legitimate interest in enhancing its economic development, but it should neither permit otherwise unlawful anticompetitive behaviour, nor forbid procompetitive behaviour, in the guise of completition law enforcement.

11. It should be noted that the "development test" is contained in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("the Set") adopted by the General Assembly in 1980,[2] the importance of which was reaffirmed by the Second United Nations Conference to Review all Aspects of the Set (the Second Review Conference) in its resolution entitled "Strengthening the implementation of the Set".[3]

12. However, the Set calls upon States "at the international level or through regional groupings" to "adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations". (Provision I.E. of the Set.)

13. Furthermore, States "should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact". (Provision 2.E. of the Set.)

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2 TD B CONF 10 Rev.1.

3 See Resolution adopted by the Conference in Annex to the Report of the Second United Nations Conference to Review all Aspects of the Set, document TD RBP CONF.3 9.

14. Provision 2.E of the Set does refer to "acts or behaviour" which "unduly restrain competition, having or being likely to have adverse effects on their trade or economic development". However, the emphasis is clearly placed on the word "competition". Furthermore, States adopting restrictive business practices control legislation have full sovereignty in determining what should be the objectives of the law. To date, the UNCTAD secretariat is unaware of any national restrictive business practices law using effects on development as a basic purpose or test for legality, although some laws refer to technological progress as grounds for granting exemptions. Hence, provided the Expert Group agrees, the last words of "Possible elements for Article I", namely "or economic development" could be dropped, and the revised text would read:

OBJECTIVES OR PURPOSE OF THE LAW

To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which unduly restrain competition, adversely affecting domestic or international trade.

ARTICLE 2: "Definitions and scope of application"

1. Definitions

(a) Enterprises

15. The comments received from the United States suggest that this definition is generally appropriate, "although it could be improved by incorporating the concept of working control". It is suggested that a further elaboration of this concept might be made during the 11th session; so far, this definition remains unchanged.

(b) Dominant position of market power

16. The comments received from the United Kingdom state that this definition "goes wider than Article 86 of the Treaty of Rome (in the United Kingdom's view at least), since it includes a position held by more than one enterprise "acting together" which are not necessarily a corporate group or economic unit held together by structural links of some sort. According to the definition, a dominant enterprise must be in a position to "control" the relevant market. This may be a higher test than that under the EEC Treaty where dominance has been linked to the ability to act independently of the market. The problem is that the definition proposed under (b) is exactly that agreed in Section B (2) of the Set. For the model law to propose amended text would imply amending the Set.

17. Again, it should be borne in mind that adopting national legislation is a question of national sovereignty and, therefore, a number of possibilities may be proposed, instead of a single definition. The text might recall the definition agreed in the Set, and add that other definitions might be considered more appropriate, such as, for example, the following version which tries to take into account the differing views:

(b) "dominant position of market power" refers to a situation in which an enterprise, acting alone, or a group of enterprises, acting together, are in a position to control the market for a particular good or service, or group of goods or services.

18. In case this definition still encounters difficulties with some participants, perhaps a variety of definitions could be proposed in the model law or laws.

(c) Relevant market [Definition remains unchanged]

II. Scope of application

Paragraph (a) [unchanged.]

Paragraph (b) [unchanged.]

Paragraph (c)

19. The comments received from the United Kingdon state that this section "provides an exemption for acts supervised by the State. This exclusion is not found in the EEC rules on competition or, generally, speaking in U.K legislation".

20. The Set clearly applies to "all enterprises regardless of the parties involved in the transactions, acts or behaviour" and this includes State enterprises, as can be seen from the definition of enterprises in provision B.3 of the Set. However, the Set does not apply to "intergovernmental agreements, nor to restrictive business practices directly caused by such agreements". (Paragraph 9 B. of the Set)

21. Similarly, the proposed model law covers State enterprises. This is clear from the definition of enterprises. But under section B.9, the Set exempts only "intergovernmental agreements" and "restrictive business practices directly caused by such agreements". The comments from the United Kingdom rightly draw attention to the fact that the exemption proposed here in the model law is wider and does not exist in a number of national legislations.

22. The IGE might wish to give further thought to this question.

23. A further exemption might be proposed here, to take into account typical exemptions in many laws, in particular with respect to labour unions. This could read:

> ***(d) Does not apply to the basic acts of cooperation necessary for the operation of farmers' or fishermen's cooperatives, labour unions and organized markets for trading stocks or commodities.***

ARTICLES 3 and 4: Restrictive agreements or arrangements

24. The comments received from the United Kingdom state that country's preference "to prohibit anti-competitive agreements in general terms (as in Article 85 of the EEC Treaty) with or without an illustrative list of prohibited practices. There is a danger of prohibiting both too much and too little if only a specified list of practices is prohibited, as it is in Article 3-I (i.e. some agreements falling in the list will not be anti-competitive and some anti-competitive agreements will not be caught). The authorization provisions in Article 3.II may be too narrow. Certain of the practices in para.I may be beneficial even when conducted by firms not subject to effective competition."

25. The comments received from the United States state that "Articles 3 and 4 seem to approach the problem of how to categorize anti-competitive behaviour by prohibiting a wide range of business practices, unless the competition agency authorises the conduct. There are at least two serious problems with this approach. First, the absolute prohibition sweeps far too wide, including not only plainly anti-competitive behaviour such as price fixing, collusive tendering, and market allocation, but also the vaguely defined "restraints on production or sales", and discriminatory pricing on an intra-enterprise basis, which ought to be prohibited only after a rule of reason analysis".

26. " Second, as Group B suggested at the tenth session, the provisions in Articles 3 and 4 for notification - as possible Government approval - of agreements that "as a whole will produce net public benefit" and of practices that are not "absolutely prohibited" is excessively regulatory and a good way to waste the competition enforcement agency's limited resources".

27. " If business conduct is not *per se* unlawful, then the competition agency should have the burden of persuasion that such conduct out to be prohibited under the rule of reason on the facts of a particular case."

28. "Indeed, Articles 3 and 4 also suffer from insufficient attention to the application of those provisions to intra-enterprise activity. The definition of "enterprise" in Article 1 is generally appropriate, although it could be improved by incorporating the concept of working control. But the definition is not used in Article 3, being replaced by the undefined term "rival or potentially rival firms"; this phrasing could lead to the unfortunate result that a parent firm could be deemed to have entered into a price-fixing agreement with its wholly-owned - but "potentially rival" - subsidiary."

Accordingly, in the United States view, the prohibition of Article 3 should apply only to conduct between or among "enterprises" as defined in Article 1.

29. Taking these points into consideration, new draft text for Article 3 is proposed below.

POSSIBLE ELEMENTS FOR ARTICLE 3

Restrictive agreements or arrangements

I. Prohibition of all agreements which unduly restrain competition, including, for example[4], the following agreements between rival or potentially rival firms[5]:

- **(a)** ***Agreements fixing prices or other terms of sale, including in international trade;***
- **(b)** ***collusive tendering;***
- **(c)** ***market or customer allocation;***
- **(d)** ***restraints on production or sales, including by quota;***
- **(e)** ***concerted refusals to purchase;***
- **(f)** ***concerted refusal to supply;***
- **(g)** ***collective unjustified denial of access to an arrangement, or association, which is crucial to competition whenever such practices are not ancillary to procompetitive joint activities and are likely to unduly restrain competition, limit access to markets, thus producing adverse effects on trade or economic development;***

regardless of whether such agreements are written or oral, formal or informal.

II. Authorization

Practices falling within Article I, when properly notified in advance and not concealed from affected parties, and especially if made by firms subject to effective competition, may be authorized when competition officials or tribunals conclude that the agreement as a whole will be consistent with the objectives of the law. Certain practices, however, may be designated as so lacking in possible justification that they will normally not be considered for authorization.

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4 Many national antitrust laws, such as in the United States and the United Kingdom, use a legal standard rather than a list of prohibited practices. Others, like the European Community, use a legal standard plus a list, but make clear that the list is illustrative only. It does not appear that any jurisdiction uses a definitive list not subject to expansion.

5 Most jurisdictions have ruled that firms under common ownership or control are not rival or potentially rival firms. See, for example, *Centrafarm B.V. v. Sterling Drug*, 1974 I.C.R. 1147 (E.C.); *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984) (U.S.)

30. With regard to Article 4, the comments received from the United Kingdom question the meaning of the phrase "acquisition and abuse of a dominant position". "Does it mean acquisition or enhancement of a dominant position ? If so, then is it intended that the acquisition of dominance be prohibited *per se*? If not, then perhaps a provision like Article 2 (2) of the ECMR (European Community Merger Regulation) might be suitable".

"Since the intention is not clear, it is difficult to comment on the related para.II (f), but presumably it should also refer to the enhancement of an existing dominant position. In addition, a merger or a joint venture may enhance (or produce) a dominant position without any gain in market share so it might be wise to delete the reference to market share in para. F (ii) and, we suggest add a reference to consideration of the effect of the acquisition (e.g. "The acquisition of control creates or strengthens a dominant position as a result of which competition would be significantly impeded.")"

31. The comment from the United Kingdom also notes that an authorization procedure is provided for in Article 4-III: "There is no equivalent to this under Article 86, although in practice the EC Commission does balances 'pros' and 'cons' in coming to a decision as to whether conduct is an abuse. It is not clear what acts, practices and transactions are "not absolutely prohibited by the law".

32. The comments from the United States also refer to Article 4.II (b) in relation to the "economic development" goal mentioned above, "which would condemn transfer pricing as an abuse of a dominant position;" "Transfer pricing may raise policy issues of some sort (e.g. taxation policy), but it does not implicate competition policy concerns. Similarly, Article 4.II (e) would forbid certain types of business conduct "when not for ensuring the achievement of legitimate business purposes". This standard would, as a practical matter, permit all sorts of anticompetitive behaviour by subordinating competition concerns to "quality", "safety", or other unnamed business purposes. There may be reasons to permit such behaviour, but the competition law is not the place to do it, in part because competition law enforcers may not know very much about the societal interests that may be thought to outweigh the interest in competition."

33. Concerning intra-enterprise activity, " (...) Article 4 II (d) clearly contemplates that an enterprise could be deemed guilty of imposing discriminatory pricing terms on its own affiliates - a peculiar result from the point of view of competition policy." Accordingly, the comments from the United States suggest that the prohibitions of Article 4.II should apply only to conduct between or among "enterprises" as defined in Article 1.

34. The comments from the United States also consider that "Article 4.II (f) seems to be the draft's merger control provision. As such, it seems to rely excessively on the notion of "abuse of a dominant position". There seems to be no reason not to have a separate Article on merger control that would focus more precisely on the concern that mergers should not be permitted to create or enhance market power or to facilitate its exercise."

35. Accordingly, a revised text is provided below for Article 4, which takes into consideration the question of transfer pricing, dealt with in 4 (II) b of the Model law. Although included in Section D.4 of the Set, transfer pricing is not normally regulated by competition statutes, and rarely creates monopoly or cartel problems. The subject has in a few instances been touched upon in cases dealing with discrimination or abuse, but has generally be regulated by tax law or by some investment control statutes.

36. This issue could be decided at the eleventh session of the IGE. Either proposed sub-section 4 (b) (bracketed) could be dropped, or it could be left bracketed with a mention that the model law is perfectly usable without such a specific provision.

37. The following, therefore, is the proposed text of Article 4:

POSSIBLE ELEMENTS FOR ARTICLE 4

ACTS OR BEHAVIOUR CONSTITUTING AN ABUSE, OR POTENTIAL ABUSE, OF A DOMINANT POSITION OF MARKET POWER

I. A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or group of goods or services, and such enterprise is engaging in abusive acts or concerted behaviour to limit access to a relevant market or otherwise unduly restrain competition, such as:

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate rival enterprises;

(b) [Discriminatory (i.e., unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services;]

(c) Fixing the prices at which goods can be resold;

(d) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Engaging in partial or complete refusal to deal on an enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

(e) Engaging in mergers, takeovers, joint ventures, or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or a conglomerate nature, when at least one of the enterprises is established within the country, and the resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or anticompetitively enhance existing dominance.

II. Authorization

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are notified before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opprtunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

ARTICLE 5: Merger control

38. Taking into account the comments received, a new Article 5 is proposed to deal with merger control. Old article 5, dealing with consumer protection, could be deleted, as in most countries consumer protection is dealt with under separate legislation. The following, therefore, is a proposed revised text for Article 5:

POSSIBLE ELEMENTS FOR ARTICLE 5

SOME POSSIBLE ASPECTS OF MERGER CONTROL

I. Notification by Acquiring Party or Merging Parties

A. An acquiring party or merging party obtaining a substantial share of a significant enterprise doing business within the jurisdiction could be compelled, or provided with incentives, to notify such acquisition or merger to the Administering Authority.

B. Size of transaction standards, such as price paid and percentage of ownership obtained, could be used to avoid reviewing competitively unimportant transactions.

C. Notification rules might require description of the products, services, markets and revenues of the enterprises involved, and submission of basic documents relating to the transaction.

II. Substantive standards

A. Acquisitions or mergers could be subject to being prevented or undone whenever they are likely to substantially lessen competition in a line of commerce in the jurisdiction or in a significant market within the jurisdiction.

B. Acquisitions or mergers might be acceptable where the parties prove that the acquiring party is the least anticompetitive purchaser for a hopelessly failing enterprise.

III. Preliminary remedy, investigation and permanent remedies

A. It could be provided that the authority can halt a merger or acquisition for a short time (e.g. 30 days) while it decides whether to conduct a full investigation, and for a somewhat longer time (e.g., 90 days) until it receives all information relevant to evaluating the probable anti-competitive effects of the transaction.

B. The authority could be empowered to compel documents and testimony from the parties and from enterprises in the affected lines of commerce, with the parties losing additional time if their response is late.

C. If the transaction is considered anticompetitive in terms of the legal standard, and if a full hearing before a tribunal results in a finding against the transaction, a permanent order against the transaction could be ordered, or if it has already been completed, divestiture of sufficient assets to remedy the competitive problem might be ordered.

ARTICLE 6 : "Notification"

39. As noted above, the general comments from Group B as well as specific ones from the United States, point to the conclusion that the notification and registration provisions are too burdensome for enterprises and for competition authorities.

40. As a matter of fact, many countries require very little notification. Many others encourage notification, but do not require it. Many laws exempt transactions which are too small or too peripheral from notification. Accordingly, in the proposed revised text, below, notification is merely encouraged (except for crucial transactions such as major mergers). The proposed new text also suggests using size, or relevance, tests as a basis for exemptions from notification.

41. The new text is given below:

POSSIBLE ELEMENTS FOR ARTICLE 6

NOTIFICATION

I. Notification by enterprises

1. When practices fall within the scope of Articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required or encouraged to notify the practices to the Administering Authority, providing details as requested or provided for.

2. Size of party, size of transaction or market share standards could be used to define transactions too minor to be appropriate for notification.

3. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

4. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of Articles 3 and 4, and existing on the date of the coming into force of the law, with the proviso that they be notified within (--- days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to full sanctions, rather than mere revision, if later discovered and deemed illegal.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within --- days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject to, where appropriate, the fulfillment of conditions and obligations.

2. Periodical review procedure for authorizations granted every (--) months/years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfillment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:

(a) *the circumstances justifying the granting of the authorization have ceased to exist;*

(b) *the enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;*

(c) *information provided in seeking the authorization was false or misleading.*

ARTICLES 7 and 8 : Administering Authority

42. The comments from the United Kingdom state that "Article 7 describes a rather different administrative structure from the one which exists in the United Kingdom or at EEC level. On the assumption that all UN member States are not expected to fall into line with this arrangement, then the differences do not matter. The same comment applies to Article 8 (functions and powers), and Article 10 (appeals)". "Also in Article 7 should the powers of the Administering Authority not include the power to demand and obtain information or documents when conducting investigations? "

43. The text of Article 7 has been broadened in order to state more clearly the power of authorities to obtain testimony and documentary evidence from the parties and from other enterprises.

44. The proposed new texts for Articles 7 and 8 follow.

POSSIBLE ELEMENTS FOR ARTICLE 7

THE ADMINISTERING AUTHORITY AND ITS ORGANIZATION

1. The establishment of the Administering Authority and its title.

2. Composition of the Authority inlcuding its chairmanship and number of members, and the manner in which they are apointed, including the authority responsible for their appointment.

3. Qualifications of persons appointed.

4. The tenure of office of the chairman and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.

5. Removal of members of the Authority.

6. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

7. Appointment of necessary staff.

POSSIBLE ELEMENTS FOR ARTICLE 8

FUNCTIONS AND POWERS OF THE ADMINISTERING AUTHORITY

1. The functions and powers of the Administering Authority could include:

(a) To make inquiries and investigations, in response to complaints or on its own initiative, with full power to compel testimony and obtain documentary evidence relevant to an authorized investigation;

(b) To take the necessary decision, including the imposition of sanctions or to recommend same to a responsible minister;

(c) To undertake studies and to publish reports and provide information to the public;

(d) To issue forms and maintain a register or registers for notifictions;

(e) To make and issue regulations;

(f) To assist in the preparation, amending or review of legislation on restrictive business practices or on related areas of regulation and competition policy;

(g) To promote exchange of information with other States.

II. Confidentiality

To accord information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

To protect the identity of persons who provide information and who need confidentiality to protect themselves against economic retaliation.

To protect the deliberations of the Authority in regard to current or still uncompleted matters.

ARTICLE 9 : Sanctions and relief

[This article remains unchanged.]

ARTICLE 10 : Appeals

[This article remains unchanged.]

ARTICLE 11 : Damages

45. A proposed new text for consideration is given below.

POSSIBLE ELEMENTS FOR ARTICLE 11

ACTIONS FOR DAMAGES

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or ommission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

To aid such actions for damages by victims of restrictive business practices, it could be provided that findings of illegality by the Administering Authority or courts (or guilty pleas accepted by such bodies) will constitute prima facie evidence of violation of any action for damages.

PART II

COMMENTARY TO ARTICLES

46. The commentaries to articles given below are those in document TD B RBP 81 and remain unchanged. On the basis of the Intergovernmental Group's decision with respect to the possible elements for articles in Part I, and taking into account comments to be made during the eleventh session of the Intergovernmental Group of Experts, a revised version of this part will be prepared for the twelfth session of the Group.

COMMENTARY TO ARTICLE 1

OBJECTIVES OR PURPOSES OF THE LAW

47. This article has been framed in accordance with section E, paragraph 2, of the Set of Principles and Rules, which sets out the primary principle on which States should base their restrictive business practices legislation. As in section A of the Set of Principles and Rules, States may wish to indicate other specific objectives of the law, taking into account the impact of restrictive business practices on their trade and development.

48. The new text refers to "control", which is in the title of the Set of Principles and Rules, and to restrictive agreements and abuses of dominant positions of market power, which are the practices set out in sections C and D of the Set. The 1984 text implies that all RBPs must involve an abuse of a dominant position, but the Set makes it clear that price fixing, etc., is illegal regardless of whether there is an abuse or a dominant position.

COMMENTARY TO ARTICLE 2

DEFINITIONS AND SCOPE OF APPLICATION

49. The definitions have been expanded to include one of "relevant market". The approach of the definition is that developed in United States merger guidelines, but generally accepted by most antitrust economists in most countries. [For a detailed explanation of the concept of "relevant market", see paragraph 58, page 26, of "Elements for provisions of a model law", document TD B RBP 15 Rev.1.]

50. The scope of application has been expanded to clarify the application of the law to natural persons, but not to governmental officials acting for a Government. However, a natural person is not an "enterprise", unless incorporated as a "personal corporation". The model law could imply that an agreement between a company and its own managing director is an agreement between two "enterprises" and thus a conspiracy. Legal analysis nearly everywhere concludes that this should not be the case.

51. Although virtually all international restrictive business practice codes, such as the EFTA Antitrust Code, the Caribbean Basis Antitrust Code, and the EC Treaty (Articles 85 and 86), apply only to enterprises, most national RBP laws apply to natural persons as well as enterprises, since deterrence and relief can be made more effective at the national level if owners or executives of enterprises can be held personally responsible for the violations they engage in or authorize.

52. Further, this definition makes clear that any agreement or action of an enterprise (except an agreement with the state) can be scrutinized to determine whether it contains an unacceptable restriction or constitutes an abuse of a dominant position.

53. The scope of application has also been clarified to exclude the sovereign acts of local Governments, to whom the power to regulate has been delegated, and to protect the acts of private persons when their conduct is compelled or supervised by Governments.

54. The reference to intellectual property is consistent with virtually all antitrust laws, which

treat licenses of technology as "agreements" and scrutinize them for restrictions or abuses like any other agreements, except that the legal exclusivity granted by the state to inventors may justify some restrictions that would not be acceptable in other contexts.

COMMENTARY TO ARTICLE 3

RESTRICTIVE AGREEMENTS OR ARRANGEMENTS

55. This article has been amended to clarify when denial of access to a joint venture should be prohibited.

56. A number of jurisdictions have ruled that firms under common ownership or control are not rival or potentially rival firms (see, e.g., *Centrafarm B.V. v. Sterling Drug*, 1974 ECR 1147 (EC); *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984)).

57. The reference to "public benefit" is a short form of the standard used, for instance, in Article 85(3) of the EC Treaty.

I. Prohibition of restrictive agreements or arrangements

58. The elements of this Article are based upon section D, paragraph 3, of the Set of Principles and Rules and in this paragraph a prohibition in principle approach has generally been followed. Such an approach is embodied, or appears to be evolving, in the restrictive practice laws described below.

59. Recent enforcement attitudes toward naked, secret cartel arrangements have been to seek deterrence by means of very substantial fines for companies, and in the United States, substantial jail sentences for responsible individuals. In the EC, members of a plastics (PVC) cartel were fined more than 30 million ECUs ($32 million) under a regulation allowing the EC Commission to assess fines of up to 10 per cent of the annual turnover of the offending enterprises (*Hoechst AV v. Commission*, Case 46 87R 1987 E. Comm. J. Rep. 1549 (1988)). In the United States, legislation was enacted in 1990 raising the maximum corporate fine for an antitrust violation from $1 million to $10 million (H.R. 29, Antitrust Amendment Act of 1990). In Japan, legislation has been introduced to allow fines of up to 6 per cent of the total commerce affected over a three-year period. A world record fine of $80 million was imposed by the Japanese Fair Trade Commission (JFTC) on a cement cartel in 1991 (60 BNA ATRR 459).

60. In the United Kingdom, the Government review of competition policy, which began in 1986, has resulted in the issuance of a Green Paper, entitled "Review of Restrictive Trade Practices Policy", which proposes a complete overhaul of the more than 30-year old legislation on restrictive business practices.[6] The document recommends new legislation which would prohibit all agreements between enterprises which produce anticompetitive effects, similar to the prohibition contained in Article 85 (1) of the EEC Treaty of Rome, as follows: "All agreements and concerted practices between undertakings, and decisions and recommendations by associations of undertakings which have the object or effect of preventing or restricting or distorting competition, in the United Kingdom, or in any part of it". Within this general prohibition, the law would enumerate the following "hard-core" anticompetitive agreements and concerted practices:

(i) Those fixing prices and charges, including any terms or conditions (e.g. discounts, credit terms) which determine effective net prices (recommendations by trade, professional and other associations on prices or charges are also included if those recommendations have the effect of determining minimum or actual prices);

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6 In July 1989, a follow-up White Paper was published entitled "Opening Markets: New Policy on Restrictive Trade Practices". This contains an amended list of practices which it is proposed to prohibit. These proposals have not yet been agreed and are therefore subject to change. [This section will therefore be completely revised in due time.]

(ii) Collusive tendering;

(iii) Those sharing or allocating markets, customers, raw materials or other inputs, production or capacity;

(iv) Those prohibiting or otherwise restricting advertising or the provision of other promotional information;

(v) Collective refusals to supply or to deal with suppliers, collective discrimination in the terms on which different customers or classes of customer are supplied, and collective anti-competitive conditions of supply such as tie-ins, aggregated or loyalty rebates and "no competition" clauses.

61. In India, the recommendations of the Sachar Committee culminated in the Monopolies and Restrictive Trade Practices (Amendment) Act of 1982 and 1984 which, in Section 32, introduced a presumption that monopolistic trade practices were prejudicial to the public interest and were therefore prohibited, subject to the defences stipulated in the Act.

(a) Agreements or arrangements between enterprises dealing with each other in the context of an economic entity wherein they are under common control

62. In the United States, the rule of the *Copperweld* decision, that commonly owned enterprises cannot be treated as rivals or separate actors, has been extended by later decisions to include companies which are majority-owned by another firm. (For example, *Satellite Fin. Planning Corp. v. First National Bank*, 633 F. Supp. 386 (D.Del.1986), but see *Sonitrol of Fresno v. AT&T*, 1986-1 Trade Cas. (CCH) § 67,080 (32.6 per cent ownership does not establish lack of rivalry).)

(b) Enterprises must be engaged on the market in rival or potentially rival activities

(c) Formal, informal, written or unwritten agreements or arrangements

(d) Limit access to markets or otherwise unduly restrain competition having or likely to have adverse effects on trade or economic development

II. Illustrative list of practices

(a) Agreements fixing prices, including as to exports and imports

63. In the Republic of Korea, after the United States limited the import of colour television sets from the Republic of Korea, Samsung, Gold Star and Dae Woo cut prices locally to increase sales, but then agreed with each other to cease cutting prices. The Fair Trade Office ordered an end to the price fixing and required the companies to apologize in the local newspaper, which they did (in re *Samsung Electronics Company*, 4 KFTC 58 (Dec.26, 1984)).

(b) Collusive tendering

64. The 1988 Restrictive Trade Practices, Monopolies and Price Control Act of Kenya makes it a criminal offence punishable by up to three years' imprisonment for two or more persons to tender for the supply or purchase of goods or services at a price, or on terms, agreed or arranged between them, except for joint tenders disclosed to, and acceptable to, the persons inviting the tender.

65. In Sweden, the Competition Act of 1983 makes collusive tendering a criminal offence. However, exemptions may be granted under certain conditions.

(c) Market or customer allocation arrangements

(d) Allocation by quota as to sales and production

(e) Collective action to enforce arrangements, for example by concerted refusals to deal

66. In June 1991, a United States Court of Appeals held that London reinsurers could be tried for an illegal boycott when such reinsurers agreed not to deal with any United States insurance companies which offered insurance covering accidents not discovered and claimed on while the policies were in effect, and thus forced adoption of uniform "claims made" policies throughout the United States (in re *Insurance Antitrust Litigation*, Dkt. 89-16530, reported in 60 BNA ATRR 909 (6/27/91)).

(f) Concerted refusal of supplies to potential buyers

(g) Collective denial of access to an arrangement or association which is crucial to competition

67. This rule has been clarified in the United States by holdings that a buying group with less than 30 per cent of the market can exclude firms as it wishes (*Northwest Wholesale Stationers v. Stationery & Printing Co.* 472 U.S. 284 (1985)), and that valid professional concerns can justify exclusions of individuals from professional associations (*Wilk v. American Medical Assoc.*, 1987-2 CCH Trade Cas. §67,721 (N.D.Ill.1987)).

III. Authorization of practices not prohibited outright

68. In India, the Monopolies and Restrictive Trade Practices (Amendment) Act, section 32, presumes that monopolistic trade practices are prejudicial to the public interest and are therefore prohibited, subject only to the defences of authorization by law, defence and security, supply of goods and services essential to the community, and agreements entered into by the Government.

69. In the United Kingdom, the Green Paper entitled "Review of Restrictive Trade Practices Policy" proposes that the registration system be abolished, as it would be illegal for businesses to operate any agreement which restricts, distorts or prevents competition. However, the law would allow exemptions to be granted on a case-by-case basis or under a block exemption. The exemption test proposed is along the lines of Article 85 (3) of the Treaty of Rome. The exemption would be granted if it:

(i) Contributes to improving the production or distribution of goods, or promotes technical or economic progress;

(ii) Allows consumers a fair share of the resulting benefits;

(iii) Does not entail restrictions which go beyond what is indispensable to attain those objectives;

(iv) Does not allow competition to be eliminated.

70. Among the possible agreements to be granted block exemptions are: exclusive distribution and purchasing agreements, patent licensing, intellectual property and know-how agreements, research and development agreements, and franchising agreements.

COMMENTARY TO ARTICLE 4

ACTS OR BEHAVIOUR IN AN ABUSE, OR ACQUISITION AND ABUSE, OF A DOMINANT POSITION OF MARKET POWER

71. Article 4 (II) (f) has been amended to set forth the usual standard for antitrust concern about a merger or acquisition.

I. Prohibition on acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power

1. The relevant market

(a) Product market (references to products include services)

(b) Geographic market

2. An enterprise, either by itself, or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service, or groups of goods or services, i.e. a dominant position of market power

(a) Dominant position of market power

72. In Poland, the Law of 24 February 1990 on Counteracting Monopolistic Practices provides a presumption that a firm with more than 30 per cent of sales in a market is in a dominant position. The same presumption is contained in Article 9 of the 1991 Competition Protection Law in Czechoslovakia.

(b) Abuse, or acquisition and abuse, of a dominant position

73. In Germany, in 1989, the Federal Cartel Office held that it was an abuse of dominant position of market power for gas supply companies immediately to pass on to distributors the full cost of a tax increase on the price of natural gas (Eighth Biennial Report of the Monopolies Commission. No.127, p.443 (1989)).

74. In the United States, both the Department of Justice and the Federal Trade Commission employ a careful enforcement approach to single firm behaviour and changes in industry structure, intervening only in those instances in which mergers, joint ventures, distribution arrangements, licensing, or other types of single firm behaviour threaten to produce clear and substantial anti-competitive effects. In Australia, the most significant amendments to the Trade Practices Act in 1986 were designed to improve the effectiveness of the provisions dealing with misuse of market power (section 46) and the application of merger provisions (section 50). Section 46 as previously drafted proved to be of limited effectiveness in controlling misuse of market power, principally because the section applied only to monopolists or those with overwhelming market dominance. Even in those cases, it was extremely difficult to prove the requisite predatory purpose. The amendments to section 46 were designed to overcome these two problems. First, the threshold test for the application of section 46 is now reduced from that of a corporation "being in a position subsequently to control a market" to "a corporation that has a substantial degree of market power". By lowering the threshold, the section may now be invoked in relation to a corporation that has a lesser degree of market power than was previously the case. The amended section is not directed at size as such, but rather at the misuse by a corporation of its market power. To reflect this, the description of the section has been changed from "monopolization" to "misuse of market power". New sub-section 46 (3) provides a guide to the way in which "market power" is to be determined. It requires that consideration be given to the extent to which the conduct of a firm is or is not constrained by competition on the part of other participants in the market, potential entrants to the market, suppliers or purchasers. Secondly, new sub-section 46 (7) makes it clear that a Court can infer the requisite predatory purpose from the conduct of the corporation or from the surrounding circumstances. While proven explicit statements may establish the necessary purpose, direct evidence of that kind is not essential. The section is directed at conduct having a predatory purpose, not at competitive behaviour as such. Such conduct may include inducing price discrimination, refusal to supply and predatory pricing. These instances are indicative only and, in each case, it would be necessary to establish the requisite degree of market power and that advantage had been taken of that power for one of the specified predatory purposes.

75. Amendments to section 50 were designed to clarify the application of the provision, and to remove uncertainties that have become apparent in the operation of the provision. The section prohibits mergers which will result in a corporation being able to control or dominate a market, except where prior authorization is obtained, on public benefit grounds, from the Trade Practices Commission. The prohibition is directed at joint venture acquisitions and acquisitions by natural persons. Where a corporation is in a position to exert a substantial degree of influence over the activities of another corporation, the latter will be taken to be associated with the former. Thus, for the purposes of determining whether an acquirer is in a position to dominate a market, the market position of any "associated" corporation will be aggregated with the position of the acquirer.

II. Abusive acts or behaviour

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors

(b) Discriminatory pricing, or terms or conditions in the supply or purchase of goods, including :en.through transfer pricing

(1) Discriminatory pricing

(2) Non-price discrimination

(c) Fixing the prices at which goods sold can be resold, including those imported and exported

76. Under the Swedish Competition Act, 1983, resale price maintenance is a criminal offence, although exemptions may be granted under certain conditions. In Portugal, the Competition Law, which came into force in June 1984, prohibits all minimum resale price maintenance, except as to books and periodicals (Decree-Law No.422 83, discussed in UNCTAD, TD B RBP 49 (1988)).

(d) Use of trademarks to prevent importation of identical or similar products legitimately bearing the identical or similar mark

77. In *K. Mart Corp. v. Cartier, Inc.*,, 486 U.S.281 (1987), the United States Supreme Court, in a 5-to-4 vote, legitimized the so-called "gray market" discounters' practice of giving customers bargain-priced goods. The court upheld Customs Service rules that let such stores as K mart Corp. and 47th Street Photo Inc. buy cameras, perfume, and other consumer producers overseas and sell them in the United States without the permission of the American trademark owners. However, the ruling involved no direct issue of antitrust law.

OTHER RESTRICTIONS ON THE PURCHASE, MANUFACTURE AND SALE OF GOODS
(Article 4, II (e), (i) to (iv))

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or services

(i) Partial or complete refusals to deal on the enterprise's customary commercial terms

78. In 1989 in Germany the Federal Cartel Office held that it was abusive for the dominant, regulated airline, Lufthansa, to refuse to interline with a small rival, since such agreements were customary and the purpose of the refusal appeared to be anti-competitive (Eighth Biennial Report of Monopolies Commission, No.128, p.443 (1989)).

79. In France, Ordinance No. 86 - 1243 on Price Liberalisation and Competition (1 December 1986) prohibits the abuse of a dominant position of market power by one or more enterprises either on a given market, on a substantial part of such a market, or on suppliers or purchasers who are economically dependent. Such abuse includes: refusals to sell, tied sales, price discrimination, conditions of supply (for example when a dealer refuses to submit to unjustified commercial conditions).

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods

80. In 1988, an Israeli court fined the Koor Company NIS 25,000 and six steel merchants NIS 20,000 each after finding that they had engaged in an illegal arrangement under which the merchants agreed to buy only steel produced by Koor. The court further warned the parties that a repeat offense would cost them NIS 4,000 and NIS 10,000 respectively (see "Investing Licensing & Trading", *Business International*, January 1989.

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported

(1) Territorial allocation

(2) Customer allocation

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee

81. The United States amended its patent law in 1988 to provide that tying one patent to another, or to purchase of a separate product, will not constitute an illegal extension of the patent right unless "the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned" (H.R. 4972, amending Section 271(d) of the Patent Act). This legislative action effectively overruled previous statements by United States courts that the holder of a patent should be presumed to have market power. The United States Congress accepted that many patented products are subject to effective competition from substitute products.

82. More recently, United States case law appears to have shifted generally towards more favourable evaluation of vertical restraints in general and of tied purchasing practices in particular. Officials of the United States Department of Justice indicate that:

> "By and large, (...) vertical restraints perform legitimate economic functions. We therefore oppose per se illegality of any vertical restraint, including tie-ins and resale price maintenance. Faced with an extreme choice of prohibiting or permitting vertical restraints in all circumstances, we would opt for the latter."
>
> *(Information supplied by the Government.)*

83. The Supreme Court ruled that producers do not necessarily violate antitrust laws if they cut off bargain outlets after getting complaints from full-price retailers.

84. In 1985, the Anti-trust Division of the Department of Justice issued guidelines describing its enforcement policy in respect of vertical restraints: the Division would not take legal proceedings against the use of vertical practices by firms with less than a 10 per cent market share. And vertical practices by firms with larger than 10 per cent market share would not necessarily be subject to challenge but would be subject to further analysis under the rule of reason.

(f) Mergers, takeovers, joint ventures, or other acquisition of control, including interlocking directorates, whether of a horizontal, vertical or a conglomerate nature

85. In December, 1989, the European Communities adopted their first comprehensive system of merger control, which became effective in September, 1990. The new regulation requires the registration of all mergers or acquisitions between firms with a combined turnover of five billion ECUs, each having at least 200 million of turnover in the EC. Such transactions have to be notified, and halted for up to 90 days if investigated. In 1990 and 1991 the Commission fully investigated more than a dozen transactions, and caused the modification of some which it believed could violate the regulatory standard by creating or strengthening a dominant position of market power in the common market or a substantial part of it and impeding the maintenance or development of effective competition in the relevant market. The Commission is authorized to lower the size thresholds by 1991 (see Davidow, "Competition Policy, Merger Control and the European Community's 1992 Program," 29 Colum. *Journal of Transnational Law*, No.11 (1991)).

86. In Germany, the Federal Cartel Office prohibited the acquisition of a major importing firm by a leading local producer, which would have given the producer control of low priced cement imports from Eastern Europe and allowed the resulting firm to dominate the South German market (Eighth Biennial Report of the German Monopolies Commission, 1989, No.147-148, p.446).

(1) Horizontal acquisitions of control

87. The Korean Fair Trade Office held illegal an acquisition combining a company with 54 per cent of the PVC stabilizer market and another company with 19 per cent of the market. The acquiring company was ordered to dispose of the stock (in re *Dong Yang Chemical Industrial Co., 1 KFTC 153* (Jan. 13, 1982)).

(2) Vertical acquisitions of control

88. In *Alberta Gas Chems. Ltd. v. E.I. DuPont de Nemours & Co., 826 F.2d 1235 (3d Cir. 1987)*, the court noted that "respected scholars question the anticompetitive effects of vertical mergers in general" and held that an acquisition causing a one per cent foreclosure was too minor to raise any legal question.

(3) Conglomerate acquisitions of control

(4) Cross-frontier acquisitions of control

89. In India in 1989, the Monopolies Commission allowed Timken to acquire a 40 per cent stake in a joint venture with Tata Iron and Steel Ltd. because it found the venture would have superior technology but would still face substantial competition and thus not be dominant (see "Business Asia" reports, *Business International*, 14 September 1989).

90. In Australia, amending legislation to strengthen and improve the effectiveness of the Trade Practices Act, 1986, was introduced to cover overseas mergers of foreign corporations with subsidiaries in Australia. Subsection 50A (1) provides that the Tribunal may, on the application of the Minister, the Commission or any other person, make a declaration that a person who, as a consequence of an acquisition outside Australia, obtains a controlling interest (defined by subsection 50A (8)) in one or more corporations, would or would be likely to dominate a substantial market for goods or services in Australia, and that the acquisition will not result in a public benefit. The term "substantial market for goods and services" is used to make it clear that the provision applies only to markets of a similar magnitude to those to which section 50 applies.

(5) Interlocking directorates

91. In the United States, the law was expanded in 1990 to provide that it is illegal not only for a company to have one of its directors serve also as a director of a competitor, but also for it to have one of its corporate officers serve as a director of a competitor (see the Amendments Act of 1990).

COMMENTARY TO ARTICLE 5

SOME POSSIBLE ASPECTS OF CONSUMER PROTECTION

92. In India, following the recommendations of the Sachar Committee, and the consequent amendment of the MRTP Act of 1982, one of the significant provisions introduced in the Act was consumer protection. A very important new provision on unfair trade practices for which there was no specific provision previously was incorporated, covering misleading advertisement, bargain selling, hoarding, destruction of goods, etc.

93. In Australia, one of the significant amendments in 1986 to the Trade Practices Act was part V of the Act, concerning consumer protection. The new section 52A prohibits, on a civil basis, unconscionable conduct by corporations in relation to consumer-type transactions. Where a contravention is proved, remedies under section 87 will be available, and the Trade Practices Commission will enforce the section by seeking injunctions where appropriate. The section is directed at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable. For example, a corporation which attempted to take advantage of a buyer's obvious lack of understanding of a transaction might fall foul of this section. The new provisions will supplement existing provisions of part V and strengthen the protection afforded to consumers against unscrupulous trading practices.

94. The amendments also strengthen provisions enabling bans to be placed on the supply of unsafe products. In the previous Act, such provisions could not be applied to unsafe products supplied before a banning order was issued. Many industries have established voluntary procedures for the recall of unsafe products in the marketplace. However, to provide an adequate mechanism for remedial action across the range of potentially unsafe products, the Government considered it necessary to provide mandatory recall powers which can be used when necessary. Where no voluntary procedures exist, or the procedures are inadequate, these powers will be able to be exercised to ensure that unsafe products are recalled from circulation or that other remedial action is taken. The provisions for mandatory recall are designed to provide reserve powers which will be available for use where the safety of the public is threatened and the situation cannot be handled adequately by voluntary recall schemes or other means. In all cases, primary responsibility for ensuring the safety of consumer goods remains with manufacturers and importers.

95. In Canada, one of the objectives of the new Competition Act, 1986, is protection of consumers. Similarly, in Sri Lanka, the new Fair Trading Commission Act No.1 of 1987 provides that the Fair Trading Commission, in examining matters pertaining to prices, should have special regard to the interests of consumers. The new Act strengthens the Consumer Protection Act No.1 of 1979.

COMMENTARY TO ARTICLE 6

NOTIFICATION

[No commentary to be added]

COMMENTARY TO ARTICLE 7

THE ADMINISTERING AUTHORITY AND ITS ORGANIZATION

96. In Peru, a 1991 law creates a commission of six members from four governmental ministries. In Kenya, the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 establishes a Monopolies and Prices Commissioner and such other officers as may be necessary for the administration of the Act.

97. In the United Kingdom, the Green Paper entitled "Review of Restrictive Trade Practices Policy" proposes that a competition authority be established, based on the present Office of Fair Trading but with a new structure and operations. In France, the new Competition Law (Ordinance No.86-1243 of 1 December 1986), under title II, established a new Competition Council (Conseil de la Concurrence) composed of 16 members nominated for six years (and renewable). Similarly, in Canada, the new Competition Act, 1986, established a Competition Tribunal and abolished the Restrictive Trade Practices Commission.

98. In Sri Lanka, the Fair Trade Commission Act (No.1 of 1987), which repealed the National Price Commission Law, 1975, established a Fair Trade Commission to discharge the functions previously undertaken by the Price Commission to control monopolies, mergers and anti-competitive practices and to formulate and implement a national price policy. The Act provides that no civil or criminal proceedings shall be instituted against the Commission for any act which in good faith is done or purported to be done by the Commission under this Act, or against any member, officer, servant or adviser of the Commission for any act which in good faith is done or purported to be done by him under this Act.

COMMENTARY TO ARTICLE 8

FUNCTIONS AND POWERS OF THE ADMINISTERING AUTHORITY

99. The previous text has been expanded to emphasize the use of RBP control authorities to comment on issues of regulation and competition and to engage in cooperation with similar authorities in other countries.

100. The confidentiality section has been expanded to mention the usual practice of protecting informers and the decisional deliberations of authorities.

101. In the United Kingdom, the Green Paper entitled "Review of Restrictive Trade Practices Policy", 1986, proposes the creation of a Competition Authority with stronger enforcement powers. The authority would have powers to require the production of information and documentation, in addition to powers of entry and search. The authority would also have power to levy fines up to a maximum of 10 per cent of total turnover. In addition, it would be empowered to apply to the Restrictive Practices Court for cease and desist orders, the breach of which would constitute contempt and thus be subject to fines and or imprisonment. Failure to comply with a reasonable request for information, the supply of misleading or false information and the reckless or wilful suppression or destruction of information would be subject to penalties. Severe penalties for obstruction of an investigation by the authority would be imposed. The law would also provide the right of private actions as an added deterrent to the making of anti-competitive agreements.

102. In France, the Competition Council, which controls anti-competitive practices as well as mergers, must also be consulted with respect to regulative or legislative texts prepared by the Government. It can take decisions and will publish annual reports; it can open a case, or be asked to do so by the Minister of Economics, by enterprises, independant administrative authorities, professional organizations, unions, consumer associations, etc. It can impose penalties of up to 5 per cent of annual turnover or up to 5 million French francs. The law describes the investigatory process, which entitles defendants to take recourse in the Appeals Court of Paris.

COMMENTARY TO ARTICLE 9

SANCTIONS AND RELIEF

103. This section has been expanded to emphasize the varied nature of sanctions and relief measures which nations are now adopting, including break-up of monopolies, restitution of illicit profits, etc..

104. A United States commission dealing with punishment of corporate crime recommended, in 1990, that fines be determined in part in relation to the amount of commerce affected by the illegal scheme (see *United States Sentencing Commission Guidelines Manual*, November 1990).

COMMENTARY TO ARTICLE 10

APPEALS

105. The European Community has recently created a specialized Court of First Instance to hear antitrust appeals, since such cases had begun to be a burden on the European Court of Justice, due to the extensive factual records involved (discussed in *I-A Hawk, United States, Common Market and International Antitrust, 37,* (1990 ed.)).

106. In Kenya, in addition to the Administering Authority, i.e. the Monopolies and Prices Commissioner and other officers, the Restrictive Trade Practices, Monopolies and Price Control Act, 1988, established a Restrictive Trade Practices Tribunal consisting of a Chairman, who must be an advocate of not less than seven years' standing, and at least two members appointed by the Minister. The Tribunal hears appeals and has powers to confirm, modify or reverse the order appealed against.

COMMENTARY TO ARTICLE 11

PRIVATE ACTIONS FOR RELIEF OR DAMAGES

107. Brazil, by adopting Law 8158 on 10 January 1991, has authorized competitors or injured persons generally to sue to enjoin crimes against the economic order, including price-fixing, predatory pricing and tying (see *60 BNA ATRR 426 (1991)*).

108. In Australia, one of the significant amendments to the Trade Practices Act 1986 was Clause 55 which amended section 87 in order to enable the Trade Practices Commission to obtain redress on behalf of particular named persons who have suffered loss or damage because of the conduct of a corporation or person in breach of the consumer protection provisions in division 1 or 1A of Part V. One of the main obstacles preventing consumers from enforcing their rights under the Act is the high cost of litigation. By allowing the Commission to seek compensation on behalf of particular consumers in certain circumstances, consumers will more easily gain redress. The amendment will be particularly useful where the Commission takes enforcement action in situations such as where a large number of consumers have each been defrauded of relatively small amounts, or where a small group of consumers have lost their savings as a result of a fraudulent representation. This kind of proceeding will be a representative action rather than a so-called "class action". The question of remedies for aggrieved consumers will only arise once the Commission has established a contravention of part V in a prosecution or a proceeding for an injunction. The aggrieved consumers must be identified in the application and must have consented in writing to the Commission's acting on their behalf. The Court is not empowered to award damages to a class of persons, but only to particular named persons. The amount of the loss suffered by each individual by reason of the contravention will have to be established.